Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

MUKHTAR MALIK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER IMPROPER OPINION TESTIMONY BY FOUR PHARMACISTS INVADED THE PROVINCE OF THE JURY ON THE ULTIMATE QUESTION HEREIN, REQUIRING A NEW TRIAL?

II.

WHETHER IMPROPER PROSECUTION EVIDENCE REQUIRES A NEW TRIAL?

III.

WHETHER THE CASE MUST BE DISMISSED WHERE THE ACTIVITY CHARGED HEREIN HAS NO SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE?

IV.

WHETHER THE BASE OFFENSE LEVEL CALCULATION IS ERRONEOUS REQUIRING RESENTENCING?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding before the United States Court of appeals were as follows:

1. United States of America -- Plaintiff-Appellee; and

2. Mukhtar Malik -- Defendant-Appellant

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Constitutional:

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The Petitioner Mukhtar Malik, respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 20, 1997 in its order denying rehearing.

OPINION BELOW

The opinion of the Court of Appeals (App. A1) is not reported and is attached hereto. The Order denying rehearing is not reported and is attached hereto. (App. A14)

JURISDICTION

The judgment of the Court of Appeals was entered on February 20, 1997. This petition is being filed within ninety (90) days of that date as required by Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION

The Fifth Amendment provides in pertinent part:

No person shall be ... deprived of life, liberty, or pro-perty without due process of law.

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

1. On November 9, 1994, a Superceding Indictment (R: 22) was filed in the Eastern District of Michigan charging Mukhtar Malik with: Count 1, conspiracy to issue prescriptions for controlled substances outside the usual course of medical practice

(21 USC 846); Counts 2 through 42, issuing improper prescriptions (21 USC 841(a)(1)); and Counts 43-59 mail fraud (18 USC 1341).

2. On April 24, 1995 jury trial commenced.

3. On May 5 a verdict of not guilty was returned as to Counts 2 and 43 through 59; a verdict of guilty was returned as to Counts 1 and 3 through 42.

4. On October 23, 1995 Mukhtar Malik was sentenced to 18 months in prison and a $40,000 fine (R: 59). He was released on $40,000 cash bond pending appeal (R: 61).

5. On October 23, 1995 Notice of Appeal (R: 62) was filed.

6. On January 9, 1997 the Court of Appeals filed an opinion affirming the conviction and sentence.

7. On February 20, 1997 the Court of Appeals entered an Order denying rehearing.

8. Mukhtar Malik is 52 years old. He was born and educated in Pakistan. He attended medical school at the University of Punjab and then he taught at that school, teaching anatomy and histology. Mukhtar Malik served an internship at Christ Hospital in New Jersey, which was a rotating internship, and thereafter completed residency in pathology at New Brunswick Hospital, New Brunswick, New Jersey, and radiology, including ultra-sound and nuclear medicine at William Beaumont Hospital, Royal Oak, Michigan.

9. For the entire period of Dr. Malik's practice he has also been involved in general practice. Radiology has no patient contact and Mukhtar Malik enjoys the patient contact. He bought a small building in Bay City, Michigan and remodeled it into a general practice office. The clinic name was Metropolitan Medical Clinic.

10. The clinic was a practice like RediMed Express, which are quick places that people from out of town or people from in town can come in for a quick diagnosis when doctors are not available or a family doctor is not available at that time.

11. The prescriptions charged in this case were all the minimal possible quantities and quantities that cannot be addictive. If a patient was addicted, he would know it and the patient would demand more. These patients that were coming once a month were receiving a small dose, which is not going to be addictive.

12. In running the clinic, Mukhtar Malik did not prescribe in hundreds; he did not give refills; he did not give anything stronger than Tylenol 3 or Tylynol 4. He never gave triplicate or Schedule 2 prescriptions. These drugs are available over the counter in Canada and other places for $6 a bottle of 100 and $4 for a bottle of the syrup.

REASONS FOR GRANTING THE PETITION

I.

OPINION TESTIMONY THAT FOUR PHARMACISTS DECIDED TO REFUSE TO FILL PRE SCRIPTIONS FROM DEFENDANT WAS IMPROPER, LACKING IN FOUNDATION AND INVADED THE PROVINCE OF THE JURY ON THE ULTIMATE ISSUE HEREIN.

Introduction

Improper opinion testimony was offered at length that four Bay City pharmacists had made a determination that they would not fill prescriptions of Mukhtar Malik. Without being qualified as expert witnesses to give opinion testimony, they testified as to their opinion in regard to Mukhtar Malik's prescriptions.

The prosecution called four Bay City pharmacists who testified that they had refused to fill prescriptions from Dr. Malik. The essence of the testimony was that on Wednesday evenings people, mostly African-Americans from the Flint area came into the pharmacies with prescriptions for Schedule III controlled substances. Because of the number of controlled substance prescriptions coming in one evening the pharmacists felt the prescriptions appeared improper and they refused to fill the prescriptions.

This opinion testimony was given in generalities and the pharmacists did not provide names, prescriptions or dates as to these prescriptions. They took no part in the examination of the patients.

There was no testimony in this case that Mukhtar Malik had agreed with anyone to be involved in providing drugs for street distribution.

The evidence was irrelevant; it did not advance the proof of the charges at hand other than to label Mukhtar Malik as a bad man.

In essence the evidence was opinion testimony invading the province of the jury in this case. The charge was issuing prescriptions for controlled substances outside the usual course of medical practice. Importantly, it was opinion testimony that could not be effectively investigated or cross-examined as to the premises of it. There was no record of names, dates, symptoms or numbers of the rejected prescriptions.

The effect of this opinion testimony was to have four professional pharmacists testify that Mukhtar Malik was a bad man. In U. S. v Ring, 513 F2d 100 (6th Cir. 1975) the court noted that such evidence tends to confuse the issue of guilt or innocence of the specific offenses charged and to weigh too heavily with the jury.

In U. S. v Dunn, 805 F2d 1275 (6th Cir. 1986) the court set forth the criteria for relevancy

> Fed.R.Evid. 402 declares, essentially, that evidence is admissible if it is 'relevant.' Fed.R.Evid. 401 states that 'Relevant evidence' means evidence having any tendency to make the

> existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. (emphasis added)

The pharmacists' opinions did not advance any fact relevant to this trial.

Instead, the devastating effect of the testimony was to say to the jury "these five citizens have already determined that in their opinion Mukhtar Malik is guilty."

In U. S. v Zelinka, 862 F2d 92 (6th Cir. 1988), the court discussed the interplay of FREvid. 403 with the other rules:

> Even if the relevancy criteria are met a trial court has discretion to exclude the evidence if 'its probative value is substantially outweighed by the danger of unfair prejudice.
>
> * * *
>
> Notes to Rule 404(b): The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403. Id., at 1500. The decision stressed the relevancy requirement.

The pharmacists' opinion testimony that they had made a determination that they would not fill prescriptions from Mukhtar Malik was improper and was devastating in its impact on the jury.

The prosecutor argued this evidence to the jury at length.

Moreover, it invaded the province of the jury on the ultimate question in this case which was whether Mukhtar Malik had issued prescriptions outside proper medical practice.

The Court of Appeals noted that this issue would be reviewed for plain error and held summarily that the issue lacked merit. Op. at 3-4.

The pharmacists' opinion evidence was improper and had a dramatic and devastating effect on the result herein.

Defense counsel's failure to object to this devastating evidence was constitutionally inadequate representation with the probable effect of loss of the case. No possible trial strategy could account for the failure to object to this evidence. The record is complete in regard to this error. Here the failure to object to this mass of testimony is difficult to understand. See, Strickland v Washington, 466 US 668 (1984). Here the record is complete in that no objection was made to massive devastating testimony and should be considered by this Court on direct appeal. See, U. S. v Rosin, 892 F2d 649 (7th Cir. 1990).

Plain Error. The testimony went without objection; this improper opinion evidence invaded the province of the jury on the ultimate issue in the case. These errors struck directly at the fundamental fairness, honesty and public reputation of the trial. See, U. S. v Young, 470 US 1 (1985); U. S. v Carroll, 26 F3d 1380 (6th Cir. 1994); Harris v Adams, 873 F2d 929 (6th Cir. 1989).

Further, the effect of this testimony on the trial was dramatic. Here the issue was whether small quantity personal prescriptions of drugs similar to Tylenol were so improper as to constitute criminal conduct beyond a reasonable doubt. Mukhtar Malik testified he acted in good faith including his response to the false ailments of the undercover police. These errors cannot be said to be harmless. See, U. S. v Carroll, supra; U. S. v Krebs, 788 F2d 1166 (6th Cir. 1986).

This is an important issue of federal law which should be settled by this Court.

II.

WHERE IMPROPER EVIDENCE ENHANCED THE CREDIBILITY OF THE PROSECUTOR'S CASE AND OTHER

IMPROPER EVIDENCE WAS GEARED TO INFLAME THE JURY AGAINST DEFENDANT, PROSECUTORIAL MISCONDUCT REQUIRES A NEW TRIAL.

During the course of the trial a broad spectrum of impermissible testimony was offered by the prosecution. The effect of it was to enhance the credibility of the prosecution with matters outside the record to paint Mukhtar Malik as a bad man:

A. Irrelevant evidence to enhance and improperly vouch for police credibility;

B. Improper police opinion testimony;

C. Inflammatory opinion testimony;

D. Irrelevant inflammatory evidence.

A. Irrelevant Evidence To Enhance And Improperly Vouch For Police Credibility

The prosecutor elicited police testimony that the investigation began with a fax communication from a local narcotics team: "[T]he fax indicated that there was a Dr. Malik in the Bay City area who was possibly involved in over -- prescribing drugs -- controlled substances. The testimony was irrelevant to the issues in this case and had the effect of bringing in another whole faceless police agency as questioning the practices of Dr. Malik.

In a similar vein Officer Willing testified at length as to other cases having nothing to do with Mukhtar Malik:

> Q: Okay. Sounds like you, since 1988, have been the supervisor basically for other investigations in maybe other parts of the state, is that right?
>
> A: All over the state of Michigan.

Q: Okay. Have you ever had the experience in your supervisory capacity of suspecting a physician of some sort of prescription drug abuse and sending in undercover officers and finding out that the doctor was legitimate?

A: On several occasions, yes.

Q: Can you, of course omitting the name of anybody or part of the state, can you give us an example from the recent past where that happened.

A: In a recent case, we'll say it's in the Flint metropolitan area, we sent an undercover in to a doctor who we had received information about possibly over prescribing. I directed the officer to complain of tenonitis [sic] in his elbow. He went in and did so, he received a non-controlled anti-inflammatory medication to take care of the problem.

Not getting the controlled substances that we thought he was over prescribing, we went in on a second visit and reiterated the problem a little bit more strongly and asked for the controlled prescription drugs. The doctor refused to provide that type of medication for a tenonitis problem of the elbow.

Still not being satisfied, we pursued it with one more visit and the doctor referred us out for physical therapy.

We determined at that point in time the doctor was acting in good faith toward his patients, had a good medical practice and was not involved in over pre-cribing controlled substances. We closed our investigation.

(Willing, V-II, pp 18-20)

In fact there was no connection between Dr. Malik and the other investigations.

These irrelevant self-serving declarations were calculated to make police opinions in this case appear omniscient. The intended message was these police officers know the difference between a good doctor and a bad doctor and the jury should trust their opinion.

Of course the testimony of officers on these matters was irrelevant to the issues at trial. Their role was to report what they did and what they observed. The above quoted testimony was clearly irrelevant; it was also clearly calculated to improperly enhance the credibility of this investigation by vouching for it with matters outside the record; all this before the testimony about this case had even begun.

The reference to these irrelevant matters was to imply that law enforcement had carefully decided the case for the jury prior to trial. In U. S. v Roberts, 618 F2d 530 (9th Cir. 1980) the court discussed the aspects of improper vouching:

> It is improper for the prosecution to vouch for the credibility of a government witness. Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony. Lawn v U. S., 355 US 339, 359-60 n 15, 78 SCt 311, 323 n. 15, 2 LEd2d 321 (1968); U. S. v Lamerson, 457 F2d 371 (5th Cir. 1972).
>
> The first type of vouching involves personal assurances of a witness's veracity and is not at issue here.
>
> The second type of vouching involves prosecutorial remarks that bolster a witness's credibility by

reference to matters outside the record. See, U. S. v Garza, 608 F2d 659, 664 (5th Cir. 1979).

Here the purpose was to

1. Tell the jury these experienced officers could tell a bad doctor when they saw one; and

2. That these experienced officers had charged Mukhtar Malik and thought he was a bad doctor.

The references to matters outside the record improperly vouched for the prosecution's investigation.

Testimony was also offered in regard to two other doctors that had been investigated:

> Q: What initial things did you do in terms of your involvement in this particular case?
>
> A: Initially we became aware of this investigation when we were also investigating two other doctors that were brought to our attention through the Michigan State Police Diversion Investigation Unit and Blue Cross Blue Shield of Michigan's Criminal Investigation Unit.
>
> Q: And progress further with the investigation of those two other physicians did you say?
>
> A: Yes.
>
> Q: You encountered some information concerning this defendant, is that right?
>
> A: That's correct.

(Montez, V-III, pp 103-04)

* * *

> Q: When you came into the defendant's waiting room, was there always roughly the same number of people there waiting or would that fluctuate, vary quite a bit?
>
> A: It would fluctuate and vary, but usually all the people that was ever in the office I already knew, they was already all the way from Flint, you know, maybe a few scattered people from Saginaw or Bay City but it was usually the same people that went to Dr. Willis that went to Dr. Wilson, they went to Dr. Fredericks; all the people down there I knew sold drugs or, you know, that I had bought drugs off of to sell, you know, it was that same little group of people.

(Allen, V-V, pp 69-70)

These matters were irrelevant to the case at hand and were calculated to connect Dr. Malik and this case to a larger problem of improper physician conduct which is in effect improper civic duty testimony.

In U. S. v Solivan, 937 F2d 1146 (6th Cir. 1991) this Court disapproved protracted prosecutorial comments on the war on drugs:

> [G]overnment prosecutors are not at liberty to urge jurors to convict defendants as blows to the drug problem faced by society or specifically, within these communities, or to send messages to all drug dealers. Such appeals are extremely prejudicial and harmful to the constitutional right to a fair trial.

Here the irrelevant testimony continued to improperly vouch for the testimony of investigators and connect Mukhtar Malik to irrelevant wrongdoing.

B. **Improper Police Opinion Testimony**

Wide ranging police opinion testimony was offered. The officers involved were not qualified as experts.

Dennis Willing testified as both an investigator in this case and as an expert on physicians gone awry.

> However, there is something rather offensive in allowing an investigating officer to testify not simply that a certain pattern of conduct is often found in narcotics cases, leaving it for the jury to determine whether the defendant's conduct fits the pattern, but also that such conduct fitted that pattern, at least when other inferences could have been drawn not unreasonably although perhaps not as reasonably as that to which the expert testified.

U. S. v Brown, 776 F2d 397 (2d Cir. 1985)

> Testimony was allowed as follows:
>
> Q: What implications -- how does that affect -- let me ask it that way, how does the difference between the triplicate scrip situation and the non trip script situation affect the investigation of a Schedule II versus a Schedule III, IV or V investigation?
>
> A: I've been investigating these cases since before the triplicate prescription program was enacted. What we found is it was very easy to obtain controlled prescription drugs from Schedule II prior to triplicate prescription.
>
> Since triplicate prescription, doctors have shied away from Schedule II drugs and they almost never prescribe them.

* * *

Q: Have you noticed anything, sir, in this regard in terms of tendencies of physicians who have been in an abusive situation in terms of whether they issue -- tend to issue more than one controlled substance prescription at a time?

A: It varies from physician to physician.

Those who are most concerned with being caught tend to issue one, those who are not quite as concerned with being caught may issue two or three, sometimes even four controlled substances. But generally, again, no refills.

(Willing, V-II, pp 22-24)

The prosecutor argued this improper evidence to the jury that "defendant fit the profile" and that the investigators had found another physician to be "legitimate." (Brunson, 05/04/96, pp 43, 57)

C. <u>Inflammatory Opinion Testimony</u>

In addition irrelevant and inflammatory police opinion testimony regarding the drug trade was offered:

Q: What sort or sorts of street abuse are you familiar with professionally that can come about through the usage or misuse of these controlled substances I've asked you about?

MR. DENTON: I question the relevancy, your Honor, and object on that basis.

THE COURT: Overruled.

(Baus, V-II, see pp 57-60)

There was also inflammatory testimony about a government "sting house" which had no relevant connection to this case:

> Q: Now you had mentioned there were some names that came up that were familiar to you because of an investigation here in Flint; is that right?
>
> A: That's correct.
>
> Q: And what, in general, was that investigation consisting of?
>
> MR. BELLAMY: Your Honor, if I may object at this point. I don't really think this has anything to do with Dr. Malik, what somebody else may have been doing in Flint. Obviously it's out of his -- unless he's charged with knowing these things, what these people are up to I think it definitely has to be tied up.
>
> THE COURT: I'll allow a very general answer. Unless there's some other reason to explore it in more detail, I would tend to agree with the objection.
>
> * * *
>
> Q: You were at the point, sir, where you had indicated that you had personally done a lot of surveillance at the defendant's office in Bay City, and also some surveillance yourself, personally, in Flint at this Sting house; is that right?
>
> A: That's correct.
>
> Q: My question, sir, is whether or not you noticed whether any of the individuals who you had

observed in the defendant's parking lot and going into the office in Bay City, did you notice any of them at the Sting house?

A: Yes, I did.

Q: Can you name any of those individuals?

A: Curtis Brown, McQuailen Lewis, I'm trying to -- Tanya, I can't think of her last name right now, Shiela Jackson.

Q: Were there other names whose names you might not be able to come up with at the moment?

A: Sure, there were quite a few.

(Willing, V-II, pp 12-16)

The defense objected to both the "street abuse" and the "sting house" testimony. The inflammatory and prejudicial nature of the testimony is clear. It was the prosecutor's intention to smear Mukhtar Malik with the spectre of street distribution. There was no evidence of any connection to or discussion of street distribution in these limited quantity prescriptions order by Dr. Malik.

In U. S. v Roberts, supra, the court disapproved argument regarding the war on drugs. The purpose of the above cited testimony was to direct jurors attention from the issue of whether the prescriptions were issued for a proper medical purpose to a question of street abuse unconnected to the actions of Mukhtar Malik.

D. Irrelevant Inflammatory Evidence

Improper inflammatory evidence was injected into the case by the prosecution to prejudice the jury against Mukhtar Malik based on factors totally irrelevant to the trial:

[Direct examination of Mark Russo]

> Also prior to going into the examination room, we observed Dr. Malik pull up to the office driving like, a new Mercedes Benz and we had a conversation about the car he was driving.
>
> * * *
>
> I mean I had a general conversation, I believe, about he was going to Pakistan again for that summer vacation. (emphasis added)

(Russo, V-II, p 22)

> [Cross examination of Mukhtar Malik]
>
> Q: Does she [Mukhtar Malik's sister] not help run the Holiday Inn you're part owner of in the state of Florida? (emphasis added)

(Malik, V-VI, p 167)

This intentional injecting of irrelevant evidence had one purpose which was to inflame the jury against the "wealthy" accused. In Sizemore v Fletcher, 921 F2d 667 (6th Cir. 1990) the court said

> We fault both the prosecutor's appeal to wealth and class biases, and her statements concerning Sizemore's consultation with seven attorneys. These comments were sufficient to create prejudicial error ...

Id., at 670

To insure that no category of improper testimony was left untouched the prosecutor injected questions of violence into the case to improperly enhance the testimony of their witness Melvin Allen:

Q: What has happened to you, what bad things have happened to you as a result of your having been caught by the Flint police?

A: Well, let's see, I've been threatened, man, I been -- I don't even work in the hospital anymore, they got me working out on Ballenger Highway by myself.

Q: Did you get convicted of any crimes?

A: No, sir.

Q: At any time when you talked to the defendant in his office --

A: Yes, sir.

Q: By the way, let me jump back to something here a moment ago you haven't received any threats from the defendant in this case, have you; there's no suggestion of that here, is there?
A: Oh, no, sir.

(Allen, V-V, p 68)

This testimony was used to generate credibility or sympathy for Allen and to gratuitously inject the spectre of violence into the case. The testimony was irrelevant and improper. See, U. S. v Love, 534 F2d 87 (6th Cir. 1976).

The foregoing improprieties separately and taken together constitute reversible error.

To the extent that defense counsel failed to object to this due process ruining evidence it was constitutionally inadequate representation with the probable effect of loss of the case. See Strickland v Washington, 466 US 668 (1984). The failure of

advocacy is dramatized by the following prosecutor argument to the jury:

> Prosecutor: I did not dream up these charges, ladies and gentlemen. A federal grand jury decided to indict the defendant, not me. That is up to some other body. It's imbedded in the constitution that the felony charges that the Grand Jury presents, an indictment is required.

(Brunson, 05/04/95, p 93)

> Defense: [Silence]
>
> Court: There's one thing I'm going to say that's not on the printed sheet, something Mr. Brunson talked about, it wasn't his decision to bring these charges, a Federal Grand Jury indicted the defendant, and that's true and that has to be true in every federal case. However, I'm concerned that, perhaps, you jurors don't know what that Grand Jury system is all about and how it operates. It hasn't been talked about during the trial, and I'm not going to go into detail on that.
>
> Let me just assure you of this, there has not been any earlier trial of this defendant. No jury has already decided that the defendant is guilty. That is not the case.
>
> The Federal Grand Jury simply reviewed the evidence and made a determination that a trial should be conducted and that this jury should make the decision as to guilty or not guilty on the evidence. It's completely, a completely different decision by a different kind of jury compared to this one. So please don't be thinking in the back of

your minds this is already done before. That is not the case.

(Court, 05/04/95, p 95)

No motion for mistrial was made. This error is reversible error despite the instruction; it is also a dramatic statement of the failure of defense counsel to serve as an effective advocate on important evidentiary matters.

The Court of Appeals held that plain error was the standard for the social problem of street drugs, the improper police opinion testimony, and inflammatory testimony and then held the contentions lack merit. Op. at 4. As to pharmacist testimony regarding street use of prscribed drugs and police testimony regarding a sting house, the court held that the testimony was relevant and that no objection had been made on inflammatory grounds and that there is no plain error. Op. at 4.

Plain Error. To the extent some of the foregoing went without defense objection. The errors detailed above are flagrant in that they represent a determined effort to improperly deflect the jury from the issues at hand. These errors struck directly at the fundamental, fairness, honesty and public reputation of the trial. See, U. S. v Young, 470 US 1 (1985); U. S. v Carroll, 26 F3d 1380 (6th Cir. 1994); Harris v Adams, 473 F2d 929 (6th Cir. 1989).

Further, these errors were persistent and permeated the trial as they both improperly enhanced the credibility of the prosecution's case and prejudiced Mukhtar Malik. Here the issue is whether small quantity personal prescriptions of drugs similar to Tylenol were so improper as to constitute criminal conduct beyond a reasonable doubt. Mukhtar Malik testified he acted in good faith including his response to the false ailments of the undercover police. These errors cannot be said to be harmless. See, U. S. v Carroll, supra; U. S. v Krebs, 788 F2d 1166 (6th Cir. 1986). This is an important issue of federal law which should be settled by this Court.

III.

WHERE THE ACTIVITY CHARGED HEREIN HAS NO SUBSTANTIAL AFFECT ON INTERSTATE COMMERCE, JURISDICTION IS ABSENT AND THE CASE MUST BE DISMISSED.

During trial of the matter the defense filed a motion for dismissal of Counts 1 through 42 of indictment charging conspiracy to violate and violation of 21 USC 841(a)(1). The motion was based on the recent case of U. S. v Lopez, 115 SCrt 1624 (1995). It was denied.

The essence of this case is whether Mukhtar Malik prescribed relatively small amounts of Schedule III controlled substances to his patients for no legitimate medical purpose. The proofs reflected periodic office visits and presentation of symptoms by the patients which under these proofs were mostly police. Mukhtar Malik did not give any drugs to these people but did issue prescriptions in accordance with the complaints.

Of course, the State of Michigan licenses and regulates the professional activities of physicians through administrative and statutory provisions. The issue of physician conduct, here framed by the requirement that Mukhtar Malik issued the prescriptions "for no legitimate medical purpose" is interstate in nature.

The charges at hand contain no jurisdictional element which would ensure, through case-by-case inquiry, that the physician conduct in question affects interstate commerce.

In Lopez the court acknowledge that within the question of whether activities "substantially affect" interstate commerce the "case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause." Id.

21 USC 801 makes findings in regard to drug trafficking and interstate commerce, but there is no case-by-case jurisdictional requirement.

The trial judge denied the motion to dismiss holding, inter alia, that Congress has the power to regulate this conduct as a

commercial transaction and that even if this conduct is purely intrastate in nature, all such transactions, in aggregate, affect interstate commerce.

Here this physician-patient activity has nothing to do with interstate commerce. The conviction herein exceeds Congress' power to legislate under the Commerce Clause, the case must be dismissed.

This is an important issue of federal law which should be settled by this Court.

IV.

WHERE THE BASE OFFENSE LEVEL CALCULATION IS ERRONEOUS RESENTENCING IS REQUIRED.

Introduction

Trial of this matter resulted in a verdict of guilty as to the undercover agent counts except Count II which was not guilty; all mail fraud counts were not guilty. Drugs in this case such as aspirin and codeine can be purchased over the counter in Windsor, Canada (Willing, V-II, p 28). Sentencing was closely contested. Ultimately the trial judge ruled as follows:

TOTAL MARIJUANA EQUIVALENCY:	5.680 GRAMS
BASE OFFENSE LEVEL:	14
SENTENCE:	15 MONTHS

The most significant components of that total are erroneous:

1. DIANE LYLES' CHART TOTAL MARIJUANA EQUIVALENCY: 3.031 GRAMS

2. UNDERCOVER POLICE OFFICER PRESCRIPTIONS FOR TUSSIONEX; MARIJUANA EQUIVALENCY: 2.381 GRAMS

Defendant raises the following issues:

A. Diane Lyles' Chart: 53% of Base Offense Level

B. Disproportionate Weight of Cough Syrup 41% of Base Offense Level

C. Police Sentence Manipulation

A. DIANE LYLES CHART 53% OF BASE OFFENSE LEVEL

Diane Lyles did not testify at trial or sentencing, but her patient chart was used to add 1300 doses of Tylenol 4 (marijuana equivalency 3031.8) to the drug quantity total.

At sentencing the defense objected as follows:

> MR. BELLAMY: It was the theory of the government in this case that Dr. Malik was writing scrips for controlled substances for nonmedical purposes. And the government in support of that claim introduced a number of patient charts which were minimally documented. And the government then argued that Dr. Malik didn't do physical exams, that he didn't make diagnoses, that he, in essence, only wrote scrips.
>
> This chart demonstrates exactly the opposite. This is a chart that a patient has -- of a patient who has seen Dr. Malik for approximately five. Years, the chart is quite detailed, it is -- I don't know -- 21 pages of handwritten notes, 60 or more radiographic diagnostic studies clearly demonstrating that this was a patient that Dr. Malik had seen and had treated for a variety of illnesses.
>
> There's a reference to a dog bite in that chart, the date is 7/15/88. There's a reference in the chart to

being beaten by husband, 11/6/87. There's another reference to being beaten up by her husband 1/15/90.

Throughout this chart there are prescriptions for antibiotics, there are any number -- there is any number of indications of physical exams and diagnostic studies.

It just doesn't seem to fit the government's theory to include this chart as one that demonstrates relevant behavior. And that's what this effort is on the part of the government.

This chart not only should not be included, but when it is included it so tilts the numbers against Dr. Malik that one would think that the government almost reached out for this chart and selected it because it didn't have charts that did demonstrate what its theory was.

This chart, I believe, accounts for scrips for Tylenol 4 over five years. Not very much. But when you take it in a very condensed period of time then it might be significant. But that isn't what happened here. So this chart should not be included for those reasons.

The same thing applies to the Tussvar cough syrup and the Doriden. This is simply not a chart that supports the government theory, therefore is not relevant.

(Bellamy, Sent, pp 4-5) (emphasis added)

The prosecutor argued that the Lyles chart is consistent with the pattern of the counts of conviction and that the amounts reflected in the chart should be counted. The prosecution

introduced an FBI 302 of Diane Lyle which, in summary, indicated that Lyles acquired the prescriptions for no medical purpose and that pills were sold for profit or consumed for addiction.

The trial judge found the Lyles chart to be part of the same pattern as the counts of conviction. He referred to a letter from Dr. Jeffrey Stross which summarized 9 charges including the Lyles chart and opined that "the pattern of prescribing in the absence of a reasonable diagnostic workup is well below a minimally acceptable standard of care." He ruled as follows:

> And the Lyles chart should be included on the drug amounts, should be included in the relevant conduct calculations, because the things that were going on with Lyles over the course of years were of a kind that was demonstrated by the other evidence at trial.
>
> Lyles was not a legitimate patient. Lyles herself said that of course in her FBI interview. She was using the drugs either to support her addiction or to sell them for profit.
>
> So, as a matter of fact, there isn't any doubt that Lyles was a trumped up patient of her own making, aided and abetted in a conspiratorial sense by Dr. Malik's willingness to accept money in exchange for prescriptions.

(Judge, Sent, pp 30-31)

It is clear that a sentence may not be based on material misinformation. U. S. v Silverman, 976 F2d 1502 (en banc)(6th Cir. 1992). Although confrontation rights do not apply as at trial proceedings, sentencing must comply with fundamental fairness and due process of law. Id.

The standard is proof by a preponderance of the evidence. U. S. v Moreno, 899 F2d 465 (6th Cir. 1990).

Here the prosecution chose not to charge Mukhtar Malik with counts in regard to Diane Lyles. They had the same information they had at the time of sentencing, they filed a 59 count indictment, but they chose not to charge the Lyles counts.

Similarly the prosecution chose not to call Diane Lyles as a witness at trial. At trial they did call Latonya Jones and Ernestine Vaughter as witnesses even though these patients were not named in the counts charged. They had all the information, but they chose not to call Lyles as a witness at trial.

Why? Lyles 302 statement is that she was a long time drug dealer and physician deceiver. She would not have been a good witness and may have actually hurt the prosecutions credibility.

Additionally, Dr. Stross was not asked and therefore not cross-examined about the Lyles chart during trial.

Instead the Lyles 302 is brought in to contravene the chart entries which show different kinds of treatment. In U. S. v Gessa, 971 F2d 1257 (en banc) (6th Cir. 1992) the court noted that a presentence report is not a per se legally sufficient basis for sentencing findings; the court cited U. S. v Granadosk, 962 F2d 757, 771 (8th Cir. 1992) as follows:

> [The] [P]resentence report is not a legally sufficient basis for making findings on contested issues of material fact.

Information in the Presentence Report and in the Lyles 302 do not meet the preponderance of the evidence standard.

In U. S. v Walton, 908 F2d 1289, 1301 (6th Cir. 1990) the court noted the use of caution in employing the preponderance standard to determine drug quantity responsibility:

> We believe that the guidelines do not permit the District Court to hold a defendant responsible for a specific quantity of drugs unless the court can conclude the defendant is more likely than not actually responsible for a quantity greater than or equal to the quantity for which the defendant is being held responsible ... . Thus when choosing

> between a number of plausible estimates of drug quantity, none of which is more likely than not the correct quantity, a court must err on the aide of caution.

The Lyles contribution to the base offense level total is significant: 1300 Tylenol 4 which equals 3031.18 grams of marijuana equivalency out of a total of 5,680 grams of marijuana equivalency.

53% of the base offense level is attributable to this person who the prosecution chose to leave off the indictment and not to call for cross-examination at trial.

The Court of Appeals held that the trial judge's ruling was not clearly erroneous. Op. at 10.

The burden of proof was not met. Here a series of assumptions favorable to the prosecution were made which are erroneous.

The sentence violates due process of law. U.S. Const. Am V.

B. DISPROPORTIONATE WEIGHT OF COUGH SYRUP

41% of the drug equivalency herein is based on 7 prescriptions for Tussionex to coughing police officers.

42 ounces of Tussionex was assigned a marijuana equivalency of 2381.4 grams out of the total in this case of 5,680 grams.

Tussionex is given this high marijuana equivalency because the narcotics contained in the cough syrup hydroxodone appears in low dose in a high quantity of non-narcotic suspension liquid.

Here the Tussionex represents 7 out of approximately 130 prescriptions. Here, as in the case of LSD the medium (here a solution as opposed to a LSD carrier) far exceeds the weight of the controlled substance itself. The result is disproportionate in that Tussionex is given a higher value than more dangerous controlled substances. See U. S. v Landers, 39 F3d 643, n 9 (6th Cir. 1994); but see U. S. v August, 984 F2d 715 (6th Cir. 1993).

Here the amount of hydrocodone is "infinitesimal" compared to the weight of the syrup. See, U. S. v Muschik, 49 F3d

512 (9th Cir. 1995). Although LSD has been dealt with as sui generis because of the "carrier" issue, and at length in litigation, the considerations of unwarranted disparity apply to the Tussionex in this case.

The Court of Appeals held that that argument is meritless and analogized it to a net weight calculation argument. Op. at 11.

The result is disproportionate resulting in an unwarranted disparity in the value given to the Tussionex for the coughing police officers.

Resentencing is required to correct the disproportionate sentence created by the high weight of Tussionex.

C. POLICE SENTENCE MANIPULATION

All the Tussionex included in the sentencing calculation was from prescriptions for the coughing officers:

Officer Russo:	12 ounces
Officer Collins:	18 ounces
Officer Anderson:	12 ounces

41% of the sentence for this "prescription mill" is accounted for by 7 prescriptions of cough syrup to coughing police officers. The total number of prescriptions was approximately 130.

At sentencing defense counsel raised the issue in terms of consideration of time as discussed in U.S. v Genao, 831 FSupp 246 (SDNY 1993), which noted that "nowhere in the Guidelines, the policy statement or the official commentary is there any reference to the need to weigh the relationship between the quantity of drugs distributed and the time it took to distribute them." Id. at 249. Defense counsel argued that the 7 Tussionex prescriptions should be reduced to one. The trial judge rejected those points.

It is clear that the 7 Tussionex prescriptions were intended by the police officers to drive up the total exposure to incarceration. It is also disproportionate; investigators ought not be allowed to control sentencing decisions.

Such improper conduct has been classified as sentencing entrapment or sentence manipulation. See U. S. v Gibbons, 25 F3d 28 (1st Cir. 1994). In U. S. v Montoya, 62 F3d (1st Cir. 1995) the

court discussed both the basis for addressing these improprieties and the remedies available:

> This is one of these superficially confusing situations in which 'jurisdiction' is in certain respects intertwined with 'the merits', and 'the merits' in turn depend on a still evolving body of case law. Under umbrella terms like sentencing entrapment and sentencing factor manipulation, the circuit courts have provided a certain amount of guidance, but there are some divisions among the circuits, and -- even in the mainstream -- more criteria than rules. This is to be expected, for the problem arises in context that is comparatively recent.
>
> Undercover agents of the state have been 'plotting' with potential defendants since Elizabethan times, and probably long before. But in federal courts the broad latitude formerly allowed to a sentencing judge made it easy to account for any equity. This discretion has now been curtailed by sentencing guidelines and statutory minimums, often keyed to amounts of drugs involved and dollars stolen. In turn, attention has turned to escape-hatch arguments which might exclude from the equation a portion of the criminal conduct.
>
> [2] Our own cases have concluded that where government agents have improperly enlarged the scope or scale of the crime, the sentencing court has ample power to deal with the situation either by excluding the tainted transaction from the computation of relevant conduct or by departing from the [guideline sentencing range]. U. S. v Connell, 960 F2d 191, 195 (1st Cir. 1992). See also, U. S. v Gibbens, 25 F3d 28, 30-32 (1st Cir. 1994); U. S. v Brewster, 1 F3d 51, 55 (1st Cir.

1993). We think that this broad principle applies to statutory minimums as well as to the guidelines.

In U. S. v Barth, 990 F2d 422 (8th Cir. 1993) the court held that if entrapment or manipulation is found, the sentencing court can depart under the Guidelines or can simply exclude the tainted transaction. Id., at 425.

Additionally Amendment 486 to the USSG provides for a downward departure if drug quantity is artificially raised by a government agent who sets a drug price substantially below market value. This is implicit recognition that the criminal investigator in the field ought not be entrusted with the sentencing decision.

It is clear that the Guidelines Commission did not provide for or envision in the regulations this situation where the officers have come up with little of significance to build a big sentence and so set out to do just that.

The first Tussionex prescription to Mark Russo occurred on March 3, 1993 which was more than 13 months after Russo began seeing Mukhtar Malic with his medical complaints.

After more than a year of investigation including tape recording undercover officers the investigators had failed to come up with any allegation that would yield a serious sentence. They set about to do that with the cough syrup.

It is clear that the urgent need for cough syrup was not to undercover crime, but to raise the sentence ante which they had heretofore failed to accomplish.

The Court of Appeals held that the Sixth Circuit has not recognized sentence manipulation by law enforcement officials as a basis for departing from Sentencing Guidelines. Op. at 11.

These Tussione prescriptions should be excluded from the base offense level because of improper sentence manipulation by the criminal investigators and because of the obvious disproportionate weight given to these 7 prescriptions to the coughing police officers. Resentencing is required.

This is an important issue of federal law which should be settled by this Court.

CONCLUSION

This Petition for Writ of Certiorari should be granted.

Submitted by,

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Dated: March 24, 1997

APPENDIX A

FILED
January 9, 1997
Leonard Green, Clerk

Not Recommended For Full-Text Publication

95-2213

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	**OPINION**
Plaintiff-Appellee	)	ON APPEAL FROM
	)	THE UNITED STATES
v.	)	DISTRICT COURT FOR
	)	THE EASTERN
MUKHTAR A. MALIK,	)	DISTRICT OF
Defendant-Appellant	)	MICHIGAN
	)	

_____/

BEFORE: CONTIE, SUHRHEINRICH, and MOORE, Circuit Judges.

KAREN NELSON MOORE, Circuit Judge. Defendant-Appellant Mukhtar A. Malik appeals his conviction and sentence for conspiracy and for prescribing controlled

substances outside the usual course of medical practice and without a legitimate medical purpose. He contends that the admission of improper evidence, prosecutorial misconduct, and failure to give certain jury instructions require a new trial. He also contends, in the alternative, that the base offense level calculation for sentencing was erroneous and requires resentencing. For the reasons discussed below, we affirm the convictions and the sentence.

I

Malik, a radiologist in Bay City, Michigan, was convicted under 21 U.S.C. §§ 846, 841(a)(1) of one count of conspiracy to distribute controlled substances and forty-one counts of distribution of controlled substances without a legitimate medical purpose. The convictions were based on prescriptions written by Malik for small amounts of controlled substances containing codeine, a schedule III narcotic.[1]

At sentencing, more than ninety percent of the base offense level used by the court was based on the prescriptions written for one patient, Diana Lyles, and the seven Tussionex prescriptions written for undercover police officers. J.A. at A452, A457, A459. The judge stated that he included the

[1] The prescriptions involved in this case were for Tylenol 3 (which contains 30 mg of codeine) and Tylenol 4 (60 mg), which both come in tablet form, and Tussionex, a cough syrup that contains a synthetic equivalent of codeine in a suspension liquid. All three are schedule III narcotics, according to the Physicians' Desk Reference (1996). Malik has repeatedly tried to minimize his prescriptions as being merely Tylenol and cough syrup.

Lyles chart in the drug amounts because it was representative of Malik's pattern. See J.A. at A451 ("the things that were going on with Lyles over the course of years were a kind that was demonstrated by the other evidence at trial"). The judge found that the government had proved by a preponderance of the evidence that the drug amounts in Lyles's chart should be included, and cited a statement Lyles had made to the FBI and the fact that the government's expert witness had taken her chart into account in his report and trial testimony. See J.A. at A448, A451, A454-55. The judge also indicated that he believed that the total amount may have "undercount[ed]" the amounts for which Malik could be held responsible. See J.A. at A452.

II

Malik challenges his conviction on numerous grounds, including evidentiary objections, prosecutorial misconduct, failure to give certain jury instructions, ineffective assistance of counsel, and the constitutionality of the statute under which he was convicted.

A

Rulings on admission of evidence after objections are reviewed for abuse of discretion. United States v. Bonds, 12 F.3d 540, 554 (6th Cir. 1993).[2] If no objection was made,

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[2] Even if the court does not find an abuse of discretion, a new trial is not required unless the defendant demonstrates an effect on his substantial rights -- i.e., prejudice. Bonds, 12 F.3d at 554. See also Fed. R. Crim. P. 52(a)(harmless error).

this court reviews admission of evidence for plain error only. United States v. Morrow, 977 F.2d 222, 228 (6th Cir. 1992) (en banc), cert. denied, 508 U.S. 975 (1993). "[I]mproper comments made by the prosecutor without objection from [the defendant]" also are reviewed for plain error. United States v. Carroll, 26 F.3d 1380, 1383 (6th Cir. 1994) (citing United States v. Young, 470 U.S. 1, 16 (1985), and Morrow, 977 F.2d at 229). Similarly, failure to give certain instructions to the jury in the absence of a request by the defense is reviewed under the plain error standard. United States v. Taylor, ___ F.3d ___, 1996 WL 705886, at *3 (6th Cir. Dec.10, 1996); United States v. Rugiero, 20 F.3d 1387, 1391 (6th Cir.), cert. denied, 115 S.Ct. 208 (1994).

Most of the issues Malik presses on appeal were not raised by objections at trial, so they are reviewed for plain error. We have considered Malik's contentions 1) that the pharmacists' testimony was without foundation, irrelevant, inflammatory, and invasive of the province of the jury as to the ultimate issue; 2) that the prosecutor improperly vouched for the credibility of the police officers; 3) that the prosecutor improperly tried to tie Malik to the social problem of street drugs and to the war on drugs; 4) that a police officer gave improper opinion testimony; 5) that the prosecutor and prosecution witnesses tried to inflame the prejudices of the jury with certain testimony; 6) and that the court erred by not giving the jury cautionary instructions regarding the circumstances of his statement to the police and regarding testimony of accomplices and/or informers. None of these contentions has merit.

Malik also challenges as irrelevant and inflammatory the testimony of a pharmacist regarding the uses of certain controlled substances for "street abuse" and the testimony of

a police officer regarding a "sting house" in Flint. At trial, defense counsel objected to both on relevancy grounds. As to the former, the court admitted the testimony as relevant to demonstrating the potential use of the controlled substances in question for purposes other than legitimate medical uses. As to the latter, the court allowed it with the understanding that the evidence that some of Malik's "patients" had been observed buying and selling controlled substances at the sting house was relevant to proving the existence of the conspiracy and the activities o the unindicted co-conspirators. The court did not abuse its discretion by admitting the testimony over the relevancy objections. Counsel did not object on the ground that the testimony was inflammatory and the court did not commit plain error by allowing it.

Malik contends that the testimony constituted prosecutorial misconduct, citing United States v. Solivan, 937 F.2d 1146 (6th Cir. 1991), which disapproved a prosecutor's remarks during closing argument regarding the war on drugs. This argument is patently meritless. The testimony here was directly relevant to the nonmedical uses to which Malik's patients were putting their prescriptions, and was neither a broad plea for a larger societal agenda nor a statement attributable to the prosecutor himself.

Malik further contends that comments made by the prosecutor during closing argument constituted prosecutorial misconduct. The comments were made during the prosecutor's rebuttal, in direct response to comments by defense counsel. Furthermore, the court acted quickly to cure any error by giving an impromptu cautionary instruction immediately following the rebuttal, before proceeding to the written instructions. See United States v. Clark, 982 F.2d 965, 969 (6th Cir. 1993).

Malik also argues that the court's failure to instruct the jury on multiple conspiracies was reversible error. This contention is also meritless. Because he did not request such an instruction, he can prevail only by showing that its omission was "plain and clearly prejudicial error." United States v. Rugiero, 20 F.3d 1387, 1391 (6th Cir.), cert. denied, 115 S.Ct. 208 (1994); see also United States v. Taylor, __F.3d __, 1996 WL 705886, at *3 (6th Cir. Dec. 10, 1996). To prove such error, Malik must show "the evidence can reasonably be construed only as supporting a finding of multiple conspiracies." United States v. Warner, 690 F.2d 545, 548 (6th Cir. 1992) (emphasis added); accord Rugiero, 20 F.3d at 1391. First, Malik asserts that the evidence did not point to a single conspiracy because there was no proof of an overarching plan, citing Kotteakos v. United States, 328 U.S. 750 (1946). The evidence in this case, unlike that in Kotteakos, does support a possible finding of a single conspiracy. Cf. Id. at 755. Second, the evidence in this case tended to show that Malik was involved in a conspiracy with a number of individuals, his "patients," not that they were involved in multiple conspiracies, of which he was a participant in only one. See Warner, 690 F.2d at 549 (holding that the fact that each member of a conspiracy did not know all the members or know of all the activities did not create multiple conspiracies). In Kotteakos, the error was that the evidence proved the existence of thirty-five separate conspiracies, each involving different defendants, and the court instructed the jury that it could find only one conspiracy, thereby imputing the activities of all thirty-five conspiracies to every defendant. See Kotteakos, 328 U.S. at 771. Here, the overarching plan on which the government built its case against Malik was a plan to redistribute

controlled substances illegally, with Malik as a supplier. Furthermore, he has not demonstrated resulting prejudice. See United States v. Mack, 837 F.2d 254, 258 (6th Cir. 1988) ("Reversal is required only where substantial rights of the appellants are involved.'") (quoting United States v. Grunsfeld, 558 F.2d 1231, 1238 (6th Cir.), cert. denied, 434 U.S. 872 (1977)).

B.

Malik further contends that trial counsel's failure to object with regard to the above issues rendered the representation constitutionally inadequate. This court generally declines to address ineffective assistance claims on direct appeal, preferring to leave the issue for post-conviction proceedings pursuant to 28 U.S.C. § 2255. See United States v. Seymour, 38 F.3d 261, 263 (6th Cir. 1994); United States v. Gonzales, 929 F.2d 213, 215 (6th Cir. 1991).

C.

Malik also challenges the constitutionality of the statute under which he was convicted, citing United States v. Lopez, 115 S.Ct. 1624 (1995). He contends that 21 U.S.C. § 841(a)(1) is unconstitutional as applied to him because the conduct at issue (prescribing drugs without a legitimate medical purpose) is physician conduct and measured by standards for physicians which are regulated by the state of Michigan and therefore intrastate in nature. He argues that the charges under 841(a)(1) "contain no jurisdictional element which would ensure, through case-by-case inquiry, that the physician conduct in question affects interstate commerce."

Defendant-Appellant's Br. at 39. This argument is completely without merit.

This court has held that the Controlled Substances Act, which includes § 841(a)(1), is within Congress's power under the Commerce Clause. United States v. Scales, 464 F.2d 371, 375 (6th Cir. 1972); see also United States v. Tucker, 90 F.3d 1135, 1140-41 (6th Cir. 1996) (holding in a case under § 860(a) that Lopez did not give the court cause to reconsider Scales). Furthermore, the law in this circuit is clear that Lopez does not require a case-by-case jurisdictional finding "where the activity, like drug trafficking, is of a kind that always implicates interstate commercial concerns." Tucker, 90 F.3d at 1141; United States v. McHenry, 97 F.3d 125, 129 (6th Cir. 1996) (holding that a statute that is "a regulation of economic activity . . . withstands constitutional scrutiny even without a demonstration that each individual instance of such activity affects interstate commerce"). See also United States v. Genao, 79 F.3d 1333, 1336 (2d Cir. 1996) ("Because narcotics trafficking represents a type of activity that Congress reasonably found substantially affected interstate commerce, the actual effect that each drug conspiracy has on interstate commerce is constitutionally irrelevant.").

Malik's attempt to focus the constitutional inquiry on the fact that physician conduct is a matter of state concern is untenable; he ignores the fact that the charges arouse from the economic activity of distributing regulated narcotics, the effect of which on interstate commerce is well-established and recognized.

III

Malik also challenges his sentence on several grounds. He contends that the court based the sentence on evidence not included in the indictment, that the calculation of the quantity of cough syrup should have been based only on the amount of the active ingredient, and that the court should have reduced the quantity of cough syrup because of sentence manipulation by the police.

The district court's finding of fact underlying application of the sentencing guidelines, including findings of fact regarding the amount of drugs on which the sentence will be based, are reviewed under a clearly erroneous standard. United States v. Mahaffey, 53 F.3d 128, 131 (6th Cir. 1995); United States v. Ward, 68 F.3d 146, 149 (6th Cir. 1995), cert. denied, 116 S.Ct. 1028 (1996).

If a defendant fails to object to an error at sentencing, he forfeits appeal as to that error. United States v. Barajas-Nunez, 91 F.3d 826, 830 (6th Cir. 1996) (citing United States v. Olano, 507 U.S. 725, 731 (1993)). Such an error will be reviewed only for plain error that affects the substantial rights of the defendant. Fed. R. Crim. P. 52(b); United States v. Sherrod, 33 F.3d 723, 724-25 (6th Cir. 1994). cert. denied, 115 S.Ct. 1317 (1995). Because Malik failed to raise his objection based on sentencing manipulation, that issue will be reviewed, if at all, for plain error. If, however, this argument is a challenge to the court's failure to depart downward, it cannot be appealed unless it appears the trial court was not aware of its discretion to do so. United States v. Kraig, 99 F.3d 1361, 1371 (6th Cir. 1996); United States v. Davis, 919 F.2d 1181, 1187 (6th Cir. 1990).

A

Malik argues that the court improperly based the offense calculation under the Sentencing Guidelines on a drug quantity based on Diana Lyles's chart. Although the prescriptions recorded in her chart were not included in the indictment and she did not testify at the trial or sentencing, her chart was entered into evidence and was one of the charts on which Dr. Jeffrey Stross, the prosecution's expert witness, based his report and testimony regarding the medical purposes of Malik's prescriptions.

The law of this circuit is clear that the calculation for sentencing can include relevant conduct other than that proved at trial, provided that the court finds it proved by a preponderance of the evidence. United States v. Silverman, 976 F.2d 1502, 1513 (6th Cir. 1992) (en banc), cert. denied, 507 U.S. 990 (1993). Under the United States Sentencing Guidelines ("U.S.S.G."), the district court "[cannot] hold a defendant responsible for a specific quantity of drugs unless the court can conclude the defendant is more likely than not actually responsible for a quantity greater than or equal to the quantity for which the defendant is being held responsible." United States v. Walton, 908 F.2d 1289, 1302 (6th Cir.), cert. denied, 498 U.S. 990 (1990); accord United States v. Thomas, 11 F.3d 620, 631 (6th Cir. 1993), cert. denied, 114 S.Ct. 1570 (1994). The drug quantity contained in the indictment and proven at trial does not determine the minimum sentence for a conviction under §§ 841(a)(1) and 846; the finding of the relevant quantity is properly left to the judge at the sentencing stage. See United States v. Jinadu, 98 F.3d 239, 247-48 (6th Cir. 1996); United States v. Hodges, 935 F.2d 766, 769-70 (6th Cir.) cert. denied, 502 U.S. 889

(1991).

The defense objected to the court's reliance on the Lyles chart for calculating the base offense level, arguing that the chart did not fit the prosecution's theory because it included some medical evaluations and prescriptions for noncontrolled substances. The prosecution argued that Lyles's chart was representative of the pattern of Malik's prescriptions, and produced a voluntary statement made by Lyles to the FBI indicating that she, like the three former patients who had been cooperating witnesses at trial, had obtained prescriptions for controlled substances from Malik for no legitimate medical purpose and had resold the drugs.

The court found by a preponderance of the evidence that Lyles's chart and her statement to the FBI demonstrated that the prescriptions for controlled substances that Malik gave her over a period of five years were representative of the pattern of behavior for which Malik had been convicted. In fact, the district judge commented that the drug quantity used for the calculation might well represent an undercounting of the amount for which Malik had been convicted. Given the evidence produced at Malik's trial to show a pattern of repeated prescriptions to a number of individuals, the district court's reliance on Lyles's chart was not clearly erroneous.

B

Malik also challenges the court's calculation of the amount of Tussionex. Forty-three percent of the base offense level calculation was based on the marijuana equivalency of seven prescriptions for six-ounce bottles of Tussionex. Arguing that the medium, a suspension liquid, "far exceeds the weight of the controlled substance," Malik contends that

the marijuana equivalency should not be calculated using the entire forty-two ounces of Tussionex.

The drug quantity table provided in the Sentencing Guidelines specifically states that "[u]nless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." U.S.S.G. § 2D.1(c)n.* (1994 ed.). As the government points out, the Sentencing Commission amended the drug equivalency for Tussionex was not changed. See U.S.S.G. App. C, amend. 517; U.S.S.G. § 2D1.1(c)n.* (1995 ed.). The Eleventh Circuit has upheld the application of the guideline equivalency for Tussionex, explicitly rejecting an argument similar to Malik's as "merely an indirect attempt to use a net weight method" in clear contradiction of the guideline. United States v. Lazarchik, 924 F.2d 211, 212, 214 (11th Cir.), cert. denied, 502 U.S. 827 (1991). Malik's argument is likewise meritless.

C

Malik also contends that the court should have reduced the amount of Tussionex because the officers sought prescriptions for Tussionex in order to inflate the drug amount calculation at sentencing. Even if this argument is not deemed forfeited, it fails on the merits. This circuit has not recognized sentence manipulation by law enforcement officials as a basis for departing from the Sentencing Guidelines. See United States v. Jones, ___ F.3d ___, 1996 WL 720716, at *5 (6th Cir. Dec. 17, 1996). The cases from other circuits that Malik cites recognize sentence manipulation only as a basis for downward departure, see United States v.

Barth, 990 F.2d 422 (8th Cir. 1993), or a as basis for appeal but only in "the extreme and unusual case," see United States v. Montoya, 62 F.3d 1, 4 (1st Cir. 1995). This is not such an extraordinary case. We hold that it was not plain error for the district court not to reduce the drug quantity on this basis.

For the reasons discussed above, we **AFFIRM** the conviction and sentence.

APPENDIX B

FILED
February 20, 1997
Leonard Green, Clerk

95-2213

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee	)	
v.	)	**ORDER**
MUKHTAR A. MALIK, Defendant-Appellant	)	

BEFORE: CONTIE, SUHRHEINRICH, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for

rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk